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PATENT APPLICATION

ATTORNEY DOCKET NO. 1044,033US1

IN THE
UNITED STATES PATENT AND TRADEMARK OFFICE

Inventor(s): Laurence E. Holt

Confirmation No.: 2629

Application No.: 09/662,316

Examiner: Mark A. Fadok

Filing Date: 8/29/2001

Group Art Unit: 3625

Title: Delivery to current location of user determined using real-time location access information of user

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TRANSMITTAL OF APPEAL BRIEF

Transmitted herewith is the Appeal Brief in this application with respect to the Notice of Appeal filed on 12/9/2005

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(complete (a) or (b) as applicable)

The proceedings herein are for a patent application and the provisions of 37 CFR 1.136(a) apply.

☐ (a) Applicant petitions for an extension of time under 37 CFR 1.136 (fees: 37 CFR 1.17(a)-(d)) for the total number of months checked below:

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☒ (b) Applicant believes that no extension of time is required. However, this conditional petition is being made to provide for the possibility that applicant has inadvertently overlooked the need for a petition and fee for extension of time.

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

First named Applicant: Laurence E. Holt	
Application No.: 09/682,316 (CONF 2629)	Group Art Unit: 3625
Filed: 8/29/2001	Examiner: Mark A. Fadok
Title: Delivery to Current Location of User Determined Using Real-Time Location Access Information of User	
Attorney Docket No.: 1044.003US1	

Assistant Commissioner for Patents
Washington, D.C. 20231

APPEAL BRIEF

This Appeal Brief is organized in accordance with the requirements set forth in 37 CFR 1.192(c).

Real party in interest

The real party in interest in this patent application is Laurence E. Holt, an individual and sole inventor.

Related appeals and interferences

There are no related appeals or interferences to the present patent application.

Status of claims

Claims 1-3 are pending in the patent application, and stand rejected, as summarized in the issue presented for appeal, below. Claim 1 is an independent claim, from which claims 2-3 ultimately depend. The other claims filed in this patent application, claims 4-20, were withdrawn in an election made in response to a restriction requirement, and are not subject to this appeal.

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Status of amendments

Claim 1 was amended in the office action response of July 15, 2005. This amendment was entered by the Examiner, and was considered by the Examiner in the Final Office Action of September 28, 2005. There are no outstanding, non-entered amendments to the claims.

Summary of claimed subject matter

The invention relates to a method in which "a user make[s] an order for one or more tangible, physical items," and therewith "provide[s] . . . a plurality of locations at which the user can receive the order and real-time location access information." (Claim 1) Thereafter, "a deliverer determin[es] *at time of delivery a current location* of the user from the plurality of locations by using the real-time location access information." (Id., emphasis added) Finally, "the deliverer deliver[s] the order to the user at the current location of the user that has been determined." (Id.)

The patent application as filed further informs as to what the claimed subject matter is directed. Consider, for instance, the problems within the prior art as delineated in the patent application as originally filed:

Today more people than ever are placing orders for and receiving delivery of items, as opposed to going to a store to purchase and take home the items themselves. . . . However, receiving delivery of their orders is problematic, given the increasingly mobile nature of people. For instance, in the past, there usually was one person of a household home at all times, so delivery was simply a matter of delivering an order to the home address of a user, since someone was always likely to be there.

Today, however, frequently no one is home during regular business hours Monday through Friday to accept delivery. Whereas delivery could be made by just leaving the order on a doorstep, this is impractical for expensive items that the person who had placed the order is worried will be stolen. Furthermore, delivery could be made to a neighbor who is at home during the day, but this is inconvenient, especially where the person does not maintain cordial relations with his or her neighbors.

(Paras. [0002]-[0003])

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Thus, the claimed invention is directed to a method in which a user makes an order, and provides with that order a number of locations at which he or she can receive the order. *At the time of delivery*, the claimed invention is limited to a deliverer *determining the current location of the user* from the number of locations that the user provided, and then delivering the order to the user at this current location. By definition, the user is always at his or her current location, and thus is always there to accept delivery.

In this way, the claimed invention provides the advantages noted in the patent application as filed:

The invention provides for advantages not found within the prior art. The user may, for example, provide a home address, a work address, as well as a second home address as the locations at which the user can accept delivery. The user may also provide the times at which he or she is likely to be at these various locations. . . .

When the deliverer is ready to make delivery, the current location of the user is determined by using the real-time location access information. *Thus, the user who had placed the order does not have to worry about delivery being made when the user is not at home, since the deliverer only attempts delivery to the current location of the user.*

(Paras. [0005]-[0006]) Therefore, the idea here is that at *the time of delivery*, the deliverer determines *a current location of the user*, and then delivers the order to this current location.

Issues

For the purposes of this appeal, there are two issues. The first issue is whether the claimed invention is directed to statutory subject matter under 35 USC 101. The second issue is whether the claimed invention, and claim 1 in particular, is patentable over Pennell (2002/0013788) in view of Chennai (non-patent article cited by the Examiner). Because claims 2-3 ultimately depend from claim 1, insofar as claim 1 is patentable, claims 2-3 are also patentable.

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Grouping of claims

For purposes of this appeal only, Applicant groups all pending claims 1-3 within a single group, and selects claim 1 as representative of these claims. Claim 1 reads as follows (all the pending, non-withdrawn claims 1-3 are listed at the end of this brief), where particular portions of claim 1 have been emphasized:

1. A method comprising:

in a computerized manner, a user making an order for one or more tangible, physical items, providing therewith a plurality of locations at which the user can receive the order and real-time location access information;

a deliverer determining at time of delivery a current location of the user from the plurality of locations by using the real-time location access information provided by the user when making the order; and,

the deliverer delivering the order to the user at the current location of the user that has been determined.

Argument

Applicant divides the argument section into two sub-sections, one dealing with the first issue as to whether the claimed invention is directed to statutory subject matter under 35 USC 101, and another dealing with the second issue as to whether the claimed invention is patentable over Pennell in view of Chennai.

35 USC 101 rejection

The claimed invention has been rejected under 35 USC 101 because the claims "are not within the technological arts." (Final Office Action, p. 2) The Examiner further notes that the method of the claimed invention "only requires a trivial use of technology." However, in light of

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the precedential opinion Ex Parte Lundgren, Appeal No. 2003-2088 (BPAI 2005), Applicant submits that the claimed invention is statutory under 35 USC 101.

In Lundgren, the Board of Appeals has held “that there is currently no judicial recognized separate ‘technological arts’ test to determine patent eligible subject matter under section 101.” Therefore, the claimed invention is statutory, since it cannot be held to be non-statutory due to the technological arts test utilized by the Examiner. That is, it does not matter whether the claimed invention is “within the technological arts,” or whether the claimed invention “only requires a trivial use of technology,” as argued by the Examiner. There is no technological arts test under 35 USC 101 per Lundgren, and therefore, the claimed invention is directed to statutory subject matter.

35 USC 103 rejection

The claimed invention, and particularly claim 1, has been rejected under 35 USC 103(a) as being unpatentable over Pennell in view of Chennai. Applicant first notes some black letter law as to obviousness under 35 USC 103(a), in particular that “[t]o establish *prima facie* obviousness of a claimed invention, all the claim limitations must be taught or suggested by the prior art.” (In re Royka, 409 F.2d 981, 180 USPQ 580 (CCPA 1974)) “All words in a claim must be considered in judging the patentability of that claim against the prior art.” (In re Wilson, 424 F.2d 1382, 1385, 165 USPQ 494, 496 (CCPA 1970)) Against this backdrop of the legal standard for obviousness, Applicant argues that three aspects of the claimed invention in particular are not taught or suggested by the prior art of record, as is now discussed in detail.

The claimed invention is limited to a plurality of locations

First, claim 1 is directed to a user providing “a plurality” of locations at which the user can receive the order he or she is making. By comparison, Pennell in view of Chennai does not teach the user providing a plurality of shipping locations. For instance, in FIG. 4 of Pennell, the user selects a home address, a work address, or another address from the box 405, and then clicks the

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fill-in button 402 to fill in the shipping information in the box 100 with this selected information. Thus, the order web site of FIG. 4 is provided with a single shipping location. Indeed, the fill-in areas of the box 100 only provide the user with the capability of furnishing a single shipping location. Insofar as Pennel in view of Chennai does not teach all the limitations of the claimed invention, therefore, the claimed invention cannot be obvious over Pennel in view of Chennai.

In response to this argument, the Examiner stated in the Final Office Action that "one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references." (P. 5) Applicant understands that the present rejection is proffered on the basis of 35 USC 103. However, insofar as the Examiner is required to show all aspects of the claimed invention within the prior art, and has particularly relied upon Pennel in showing the "plurality of locations" limitation of the claimed invention, Applicant is simply considering the prior art in the same way that the Examiner has considered the prior art. That is, if the Examiner says that a certain reference teaches a certain aspect of the claimed invention, it is appropriate for Applicant to refute the Examiner's assertion by showing how that reference does indeed not teach that aspect of the claimed invention. Otherwise, there is no way for Applicant to refute the Examiner in his contention that the prior art in combination shows discloses all the claimed limitations. That is, insofar as Pennel does not teach the recited claim limitation as stated by the Examiner, then Pennel in view of Chennai cannot teach all the limitations of the claimed invention.

The Examiner, for instance, on page 3 of the Final Office Action, has stated that "Pennell teaches providing multiple addresses . . . (FIG. 4, item 405)." However, Applicant has explained above why Pennel does not actually teach or disclose the user providing multiple addresses (i.e., a plurality of shipping locations). The Examiner on page 5 of the Final Office action does state that "the address confirmation of Chennai once again asks the purchaser to select from the plurality of addresses (home work or other) before actual delivery." However, Applicant has reviewed Chennai in detail, and cannot find any recitation in this reference as to the user providing a plurality of locations at which he or she can receive delivery of an order, while the user is actually

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making the order, as to which the claimed invention is limited. Chennai discloses nothing about the order-making process, and rather only speaks to the order-delivery process. The Examiner earlier in the Final Office Action relies on Pennel as to teaching the order-making limitations of the claimed invention, and only here inexplicably says that Chennai teaches the order-making limitations of the claimed invention, without providing any recitation as to where Chennai teaches these limitations as to the user providing a plurality of locations.

The claimed invention is limited to the deliverer's determining at time of delivery

Second, claim 1 is directed to the deliverer determining *at time of delivery* the current location of the user. By comparison, Chennai in particular notes that the users are notified "through their e-mail or postal address, *prior to delivery*." Thus, Chennai, and therefore Pennell in view of Chennai, does not disclose the claimed invention, because the claimed invention is limited to the deliverer determining the current location of the user *at time of delivery* – not *prior to delivery*. Insofar as Pennel in view of Chennai does not teach all the limitations of the claimed invention, therefore, the claimed invention cannot be obvious over Pennel in view of Chennai.

In response, the Examiner has stated in the Final Office Action that he "disagrees and notes that applicant's specification does not specifically define what the specific meaning of 'at time of delivery' represents." (P. 5) Therefore, "the examiner has defined this period as any time prior to the actual delivery." (Id.) Applicant submits, however, that the Examiner is not properly interpreting the claim limitation "at time of delivery" in making this argument.

Applicant begins with explaining the proper interpretation of the claim limitation "at time of delivery." The Federal Circuit case law claim interpretation process is that the general rule of claim interpretation is that terms in a claim are to be given their ordinary and accustomed meaning. (Renishaw PLC v. Marpos Societa per Azioni, 158 F.3d 1243, 1249, 48 USPQ2d 1117, 1121 (Fed. Cir. 1998); York Prods., Inc. v. Central Tractor Farm & Family Ctr., 99 F.3d 1568, 1572, 40 USPQ2d 1619, 1622 (Fed. Cir. 1996)) Here, there is no doubt as to the "ordinary and accustomed meaning" as to the language "at time of delivery." At "time of delivery" means

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just that – it answers the question of *when*, and answers “at the time of delivery.” There is no lack of clarity as to the claim language, such that the general rule that this claim terminology is to be given its ordinary and accustomed meaning controls and governs.

As has been noted above, the Examiner has interpreted “time of delivery” as “any time prior to the actual delivery.” Thus, the Examiner has reached essentially a *contradictory* meaning, stating that “time of delivery” means not just that – at the time of delivery – but rather means “any time *prior to* [i.e., before] actual delivery.” The Examiner basis his conclusion on the fact that “applicant’s specification does not specifically define what the specific meaning of ‘at time of delivery’ represents.” However, the Examiner is very much not correctly following the claim interpretation process in immediately looking to the specification to define this terminology of the claims.

As has been stated above, one must first look to the ordinary and accustomed meaning of claim language in order to assess its meaning. The Examiner does not, but rather first looks to the specification in assessing the meaning of “at time of delivery.” This is wrong. Rather, it may be required to enter the definition of a claim term other than its ordinary and accustomed meaning only where such meaning so deprives the claim of clarity that there is no means by which the scope of the claim may be ascertained from the language used. (*Eastman Kodak Co. v. Goodyear Tire & Rubber Co.*, 114 F.3d 1547, 1554, 42 USPQ2d 1737, 1741 (Fed. Cir. 1997), overruled on other grounds by *Cybor Corp. v. FAS Techs., Inc.*, 138 F.3d 1448, 46 USPQ2d 1169 (Fed. Cir. 1998) (en banc); *J.T. Eaton & Co. v. Atlantic Paste & Glue Co.*, 106 F.3d 1563, 1568, 41 USPQ 1641, 1646 (Fed. Cir. 1997); *North Am. Vaccine, Inc. v. American Cyanamid Co.*, 7 F.3d 1571, 1576, 28 USPQ 2d 1333, 1336 (Fed. Cir. 1993); *Comark Communications, Inc. v. Harris Corp.*, 156 F.3d 1182, 1187, 48 USPQ2d 1001, 1005 (Fed. Cir. 1998)) In such circumstances, a term used in the claim invites or requires reference to intrinsic, or in some cases, extrinsic, evidence to determine the scope of the claim language. (*Johnson Worldwide Assocs., Inc. v. Zebco Corp.*, 175 F.3d 985, 50 USPQ2d 1607, 1611 (Fed. Cir. 1999) (citing *Vitronics Corp. v. Conceptiontronic, Inc.*, 90 F.3d 1576, 1583, 39 USPQ2d 1573, 1577 (Fed. Cir. 1996))

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Here, the Examiner has not provided any reasoning why the ordinary and accustomed meaning of “at time of delivery” “so deprives the claim of clarity that there is no means by which the scope of the claim may be ascertained from the language used.” Instead, the Examiner immediately jumps to the specification, and, upon not finding an explicit definition for the terminology “at time of delivery,” literally makes up his own, stating that he “has defined this period as any time prior to the actual delivery.” That is, in providing this definition, the Examiner has not stated upon which extrinsic evidence he has relied to come up with this definition. The definition just appears out of thin air – and, indeed, is a contradictory definition as to the accustomed meaning of this terminology.

For all of the reasons that have been described, the Examiner is incorrect in defining “at time of delivery” as “any time prior to the actual delivery.” Indeed, if the Examiner’s definition of the claim language at issue were correct, then there would be no point in having claims at all. That is, if the clear language “at time of delivery” can somehow be twisted to mean essentially the opposite – “at any time prior to delivery” – then the meaning of any term in any claim immediately becomes suspect and open to contradictory definitions. At the end of the day, it is untenable to suggest that the language “at time of delivery” can be interpreted to result in a contradictory definition. Because subscribing to the Examiner’s incorrect interpretation of “at time of delivery” is the only way in which the prior art reads on the claimed invention, the claimed invention is patentable. That is, in accordance with a correct interpretation of “at time of delivery” the claimed invention is not disclosed, suggested, or taught by the prior art.

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The claimed invention as a whole has not been considered by the Examiner

Third, Applicant notes that the *determination* of the current location of the user *from a number of locations, at time of delivery* is an important aspect of the invention, and submits that the Examiner did not consider these limitations of the claimed invention *as a whole* in rejecting the claimed invention. That is, whereas in the previous two described reasons as to why the claimed invention is non-obvious the “determination” limitation and the “at time of delivery” limitation were considered separately, in this fourth reason, these two limitations are taken as a whole. As guided by the MPEP and black letter law, “the question under 35 USC 103 is not whether the differences *themselves* would have been obvious, but whether the claimed invention *as a whole* would have been obvious.” (*Stratoflex, Inc. v. Aeroquip Corp.*, 713 F.2d 1530 (Fed. Cir. 1983), *cited in* MPEP sec. 2141.02)

Therefore, consider this scenario in the prior art. A user in Pennell in view of Chennai provides his or her home address as the shipping address. Prior to delivery, the deliverer confirms that this is the correct shipping address. However, at the actual time of delivery, the user is not home – and thus cannot take delivery of the item. To this end, Pennell in view of Chennai does not solve the problem noted in the patent application as filed:

Today more people than ever are placing orders for and receiving delivery of items, as opposed to going to a store to purchase and take home the items themselves. . . . However, receiving delivery of their orders is problematic, given the increasingly mobile nature of people. For instance, in the past, there usually was one person of a household home at all times, so delivery was simply a matter of delivering an order to the home address of a user, since someone was always likely to be there.

Today, however, frequently no one is home during regular business hours Monday through Friday to accept delivery. Whereas delivery could be made by just leaving the order on a doorstep, this is impractical for expensive items that the person who had placed the order is worried will be stolen. Furthermore, delivery could be made to a neighbor who is at home during the day, but this is inconvenient, especially where the person does not maintain cordial relations with his or her neighbors.

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(Paras. [0002]-[0003]) That is, the home address of the user could be confirmed prior to delivery, as in Pennell in view of Chennai, but the user may nevertheless not be home at the time of delivery. Pennell in view of Chennai thus does not render obvious the claimed invention as a whole.

By comparison, claim 1 is directed to a method in which a user makes an order, and provides with that order a number of locations at which he or she can receive the order. *At the time of delivery*, claim 1 is limited to a deliverer *determining* the current location of the user from the number of locations that the user provided, and then delivering the order to the user at this current location. By definition, the user is always at his or her current location, and thus is always there to accept delivery. The invention thus provides the advantages noted in the patent application as filed:

The invention provides for advantages not found within the prior art. The user may, for example, provide a home address, a work address, as well as a second home address as the locations at which the user can accept delivery. The user may also provide the times at which he or she is likely to be at these various locations. . . .

When the deliverer is ready to make delivery, the current location of the user is determined by using the real-time location access information. *Thus, the user who had placed the order does not have to worry about delivery being made when the user is not at home, since the deliverer only attempts delivery to the current location of the user.*

(Paras. [0005]-[0006]) Pennell in view of Chennai does not provide for these advantages. Only a single address is input, and that address is verified or confirmed *prior to delivery*. However, at the actual time of delivery, the user may not be at the verified or confirmed address, and thus still has to worry about delivery being made when the user is not at this address.

Applicant believes that there may be some confusion as to what the term "current location" of the user means in claim 1. The Examiner is interpreting "current location" of the user to mean where a user actually lives, or actually works. For instance, in Pennell in view of Chennai, the user provides his or her home or work address. However, the "current location" of a user is not necessarily where the user actually lives or works, since the user may be at work, and

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thus not at home, or may be at home, and thus not at work. The current location of a user is the location where the user currently is – not necessarily where he or she lives or works, and not necessarily the shipping address that he or she input when ordering an item. Thus, Pennell in view of Chennai confirms or verifies the user's shipping address prior to delivery, which is not the user's current location at time of delivery. A shipping address may still be correct, even if the user is not currently there. This is why Pennell in view of Chennai does not render the claimed invention obvious. The claimed invention uniquely determines the user's current location at time of delivery, and delivers the item to that current location. By definition, a user is always at his or her current location. Pennell in view of Chennai verifies the user's shipping address prior to delivery, and delivers the item to that verified shipping address – even if the user is not currently at that address (i.e., that address is not the user's current location).

In response to these arguments, the Examiner has stated in the Final Office Action that "it is noted that the features upon which applicant relies . . . are not recited in the rejected claim(s)." (P. 6) In particular, the Examiner notes that "delivering the item to a current location of the user" is not found in the claims since "the actual claim delivers the item to an address that was determined from a confirmation step, but is not necessarily the current location of the user since the user may have moved after the determining step." (P. 6) Applicant does not understand the Examiner's response in this respect. It appears that the Examiner, not Applicant, is relying upon features not recited in the claims, as is now discussed in more detail.

In particular, the Examiner states that delivery may be to an address that "is not necessarily the current location of the user since the user may have moved after the determining step." However, the claim language is clear in that the "deliverer deliver[s] the order to the user *at the current location*." The claim language point-blank states that the order is delivered to "the current location," but the Examiner states otherwise, that this current location of the user, as to which the claimed invention is explicitly limited, "is not necessarily the current location of the user." Applicant's initial reaction is one from the gut – *Huh?* That is, the current location of the user is just that, the current location of the user, and not, as the Examiner would have it, as "not

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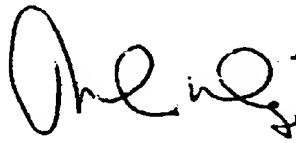
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necessarily the current location of the user.” The Examiner again appears to be interpreting the claim language in a way not supported by the ordinary and accustomed meaning of the terms of the claims. If the “current location of the user” can somehow be twisted to mean “not necessarily the current location of the user,” then Applicant is at a complete loss as to how any invention can be clearly defined by claim language.

Conclusion

Applicant believes that the pending claims are in condition for allowance, and requests that they so be allowed, for the reasons described above.

Respectfully Submitted,



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Listing of claims on appeal

1. (previously presented) A method comprising:
in a computerized manner, a user making an order for one or more tangible, physical items, providing therewith a plurality of one or more locations at which the user can receive the order and real-time location access information;
a deliverer determining at time of delivery a current location of the user from the plurality of one or more locations by using the real-time location access information provided by the user when making the order; and,
the deliverer delivering the order to the user at the current location of the user that has been determined.
2. (original) The method of claim 1, wherein the real-time location access information comprises an instant message address of the user.
3. (original) The method of claim 2, wherein the deliverer determining at the time of delivery the current location of the user comprises sending an instant message to the user at the instant message address of the user.
- 4.-23. (withdrawn, and thus not presented here since these claims are not at issue in this appeal)